

No. 2505

In the United States Circuit
Court of Appeals

FOR THE NINTH CIRCUIT

CONSOLIDATED CON-
TRACT COMPANY and
PACIFIC COAST CASU-
ALTY COMPANY,

Appellants

vs.

HASSAM PAVING COM-
PANY and
OREGON HASSAM PAV-
ING COMPANY,

Appellees

Petition for Re-Hearing

JESSE STEARNS,
JOHN H. HALL,

For Appellants

LOUIS W. SOUTHGATE,
CAREY & KERR,

For Appellees

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TO THE HONORABLE JUDGES OF THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE NINTH
CIRCUIT.

Come now your petitioners, the above named appel-
lants, and respectfully petition your Honorable Court
to set aside your decree of affirmance heretofore made
in this cause, and to grant your petitioners a re-hearing
upon the following grounds:

I.

1. Because there is no allegation in the Bill of Complaint, and no proof in the record showing, or tending to show, that your petitioner, the Pacific Coast Casualty Company, committed any infringement of the patents set forth in the Bill of Complaint.

2. Because there is no allegation in the Bill of Complaint, or any proof in the record showing, or tending to show, that at the time the Pacific Coast Casualty Company became surety on the bond set forth in the Bill of Complaint, and given to the City of Portland, conditioned upon the faithful performance of the contract of the Consolidated Contract Company, that the Pacific Coast Casualty Company had any knowledge that the pavement contracted for constituted any infringement of the patents mentioned in the Bill of Complaint.

3. Because there was no ground alleged in the Bill of Complaint, nor any proof offered, upon which to base a decree against the Pacific Coast Casualty Company for an accounting, or for costs of the suit, either in the District Court, or in your Honorable Court.

The allegations in regard to the bond furnished to the City of Portland, and the bond itself as set forth on pages 33-36 of the record, clearly show that the only obligation assumed by the Pacific Coast Casualty Company was for the faithful performance of the work undertaken by the Consolidated Contract Company in its contract with the City of Portland; and that the only connection the Pacific Coast Casualty Company had with the matter was as surety upon the bond given to the

City of Portland, and it is so stated in the statement of the case, as appears on page 5 of the Opinion (type-written) of this Court.

The pavement is referred to as "Hassam Pavement" only once, and that appears in the detailed bid (record, page 29), and it is nowhere referred to in the contract or in the bond as "Hassam Pavement," and no showing was made on behalf of the complainants that the Surety Company had any knowledge of the kind of pavement that was to be laid, or any knowledge of any infringement, or claim of infringement, made, or attempted to be made, against the rights of the complainants or either of them, under the patents set forth in the Complaint; nor that the Pacific Coast Casualty Company had any knowledge or belief that an arrangement had not been made for royalty to be paid by the Consolidated Contract Company for the laying of said pavement.

Furthermore, there is no legal obligation upon a mere surety for the performance of a contract to investigate or ascertain whether the contractor is about to use any patented material or process, or whether, in the performance of his contract, he may or may not be about to infringe or violate the right of some third party.

Neither counsel for appellants nor for appellees specifically called the attention of your Honorable Court to the question of the Pacific Coast Casualty Company's liability in the cause, and therefore your petitioners assume that the decree of the District Court was inadvertently affirmed by your Honorable Court as to the Pacific Coast Casualty Company; and for

that reason, and in order that the matter may be more fully presented, your petitioners deem that a re-hearing upon this point is proper and necessary to protect the rights of said Corporation.

II.

Your petitioners further request a re-hearing because it appears from the Opinion of your Honorable Court that the uncontradicted testimony of the witnesses Gilman and Gordon showing public use of the same process described in complainants' patent long prior to the granting of such patents, was inadvertently overlooked by your Honorable Court.

Claim 1 of Letters Patent No. 819,652, and alleged to have been infringed by appellants, is as follows:

“A road or pavement consisting of a bottom layer of hard rolled uncoated stone, a grouting of cement placed upon said stone and filling all the voids therein, and a suitable surface placed on said grout.”

It appears from the specifications of this patent that broken stone or gravel is spread to a proper depth and rolled with a steam roller, or *compressed by any suitable means*. The testimony of Gilman and Gordon show that broken, uncoated stone was placed upon the ground and rolled with a hand-roller, or compressed with a tamper, and that then grout was spread thereon filling the voids; and that this process was used not only by the Russian who laid such a pavement in front of the blacksmith shop, but that it was used for basement floors and foundations.

This testimony is not mentioned in the Opinion of your Honorable Court, and your petitioners therefore assume that it was inadvertently overlooked, and for that reason your petitioners respectfully request a re-hearing in order that the matter may be more fully discussed and brought to your Honors' attention.

It was conceded by the learned counsel for appellees in his argument before the District Court, that the process used by McClintock in laying the pavement in the City of Rochester, in 1893, was open to use by anybody; and this concession is apparently inconsistent with the theory of an abandoned experiment, the use having been public and having been fully described in a printed publication, and the public generally are therefore entitled to the benefit of such use and such publication; and the unrestricted use of a pavement made of uncoated stone, rolled and then grouted, without agitating the mass by a roller after the grouting, should be declared open to the public generally, and that right should be pointed out in the decree of your Honorable Court.

And your petitioners will ever pray.

Dated this 6th day of November, 1915.

JESSE STEARNS,

JOHN H. HALL,

Solicitors.

Being of counsel for appellants and petitioners herein, I hereby certify that the foregoing petition is made in good faith and is well founded in right and reason and is not interposed for delay.

JESSE STEARNS.

